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In the Supreme Court of the United States

OCTOBER TERM, 1982

DENNIS JUREN and EDWARD W. CROMEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONERS

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The government has given this Court misguided advice, both with respect to the procedure to be followed in disposing of the pending petition and with respect to the merits of petitioners' objection to the Department of Energy's subpoenas. We address first the procedural deficiencies in the government's position, and then turn to the question of DOE's purpose in issuing the disputed subpoenas.

1. The Court should hold the present petition pending the government's decision whether to seek further review on the question of the district court's jurisdiction, and, if the government decides to seek certiorari, pending the disposition of the government's petition. The Court should not act separately on the substantive and jurisdictional issues involved in this case, as the government now suggests. On the contrary, if the D.C. Circuit's holding that the district court lacked jurisdiction remains undisturbed, this Court should grant the present petition and summarily vacate the decision of the Temporary

Emergency Court of Appeals. On the other hand, if the government seeks review of the D.C. Circuit's ruling, and the Court is inclined to grant review, then it should grant the present petition as well, so that both aspects of the case can be reviewed together.

Until the filing of the government's brief in opposition on March 7, 1983, the government apparently agreed with petitioners' view that the disposition of the present petition should await the resolution of the question of the district court's jurisdiction. Three times the government sought 30-day extensions of the time within which to respond to the pending petition, and three times the government justified its request by reference to the appeal in the D.C. Circuit. See letters from the Solicitor General to the Clerk of this Court, dated December 2, 1982; January 3, 1983; and February 1, 1983. Indeed, the government's third request for an extension of time was based on the explicit representation that "[t]he government will be better able to respond to the petition in No. 82-739 after a decision whether or not to petition for a writ of certiorari in the District of Columbia Circuit case has been made."

Now, suddenly, although the government has not yet decided whether to seek review of the D.C. Circuit's ruling, it has urged this Court immediately to deny the pending petition. The Court should reject the government's precipitate invitation.

The unusual procedural posture of this case is a product of the bifurcated appellate jurisdiction created by Congress in Section 211(b) of the Economic Stabilization Act of 1970 ("ESA"), 12 U.S.C. 1904 note, incorporated by reference in Section 5 of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. 754. As interpreted by the TECA and by other federal courts of appeals, the TECA's jurisdiction under this statute is a so-called "issue" jurisdiction that depends on whether the particular question in dispute involves

some aspect of the ESA or the EPAA. See Pet. 8-9 n.4, and authorities there cited.

In the present case, the district court erroneously concluded that it had jurisdiction over the Department of Energy's subpoena enforcement actions under Section 645 of the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. (Supp. III) 7255. The D.C. Circuit reversed that decision, and the TECA did not address the question of the district court's jurisdiction. Petitioners believed that, because the jurisdictional issue turned on the proper interpretation of Section 645 of the DOEOA, appellate jurisdiction over that issue lay only in the D.C. Circuit, not in the TECA. The D.C. Circuit agreed. See *United States* v. *Hill*, 694 F.2d 258, 260 n.5 (D.C. Cir. 1982).

In an ordinary case, a district court judgment is appealed to only one appellate court. If that court holds that the distict court lacked jurisdiction, the case goes no further. Indeed, a court of appeals is not empowered to address the merits of the case in such circumstances. See, *e.g.*, *United States* v. *Corrick*, 298 U.S. 435, 440 (1936); *Rock Island Millwork Co.* v. *Hedges-Gough Lumber Co.*, 337 F.2d 24, 27 (8th Cir. 1964) ("if the court tries a case where jurisdiction is lacking the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action"); *Warren G. Kleban Engineering Corp.* v. *Caldwell*, 490 F.2d 800, 803 n.2 (5th Cir. 1974).

Here, by contrast, the question of the district court's jurisdiction was considered by a court of appeals other than the one that considered the propriety of DOE's subponeas. As a consequence, an appellate decision on the merits has been rendered in circumstances where no such ruling would ordinarily be made. The TECA's decision would not exist, but for the peculiar scheme of appellate jurisdiction created by the ESA and the EPAA.

In this situation, the TECA decision should be vacated, unless the D.C. Circuit's ruling is overturned on further review. Petitioners should not be required to face any risk whatsoever of adverse effects from the TECA decision, when the government is the party responsible for bringing these actions in an inappropriate forum that lacked jurisdiction from the outset.

The government now advances the gratuitous and ill-conceived suggestion that petitioners' challenge to the TECA decision could "more properly be made by means of a collateral attack * * * at some later time, in the event that the TECA decision affects petitioners' substantial rights" (Br. in Opp. 9 n.8). The government does not suggest any procedure by which petitioners could initiate such an attack. Apparently, the government means to contend that petitioners should be compelled to await further DOE subpoena enforcement actions, in which proceedings petitioners would be free to oppose any government effort to rely on the TECA decision now before this Court. That is precisely the predicament that petitioners seek to avoid. The TECA decision is properly before this Court on direct review, and petitioners cannot fairly be forced to deal at some later date with a decision that should not have been rendered in the first place.

Nor is there any significance to the government's observation that "petitioners did not present the issue of the district court's jurisdiction as a question for review by this Court" (Br. in Opp. 9 n.8). That question was not addressed by the TECA and, in petitioners' view, was not within the TECA's jurisdiction to decide. Accordingly, petitioners had no occasion to raise the issue in their petition for certiorari. Moreover, the question has been resolved in petitioners' favor by the D.C. Circuit, and unless that decision is overturned it is the law of the

case. This Court has frequently acknowledged that the jurisdiction of the courts below is an appropriate subject for inquiry here, even if no party has specifically called the matter to the Court's attention. See, *e.g.*, *Mitchell* v. *Maurer*, 293 U.S. 237, 241-244 (1934); *Clark* v. *Paul Gray, Inc.*, 306 U.S. 583, 588 (1939); *Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975). Especially in view of this principle, there is surely no impediment to petitioners' contention that the decision of the TECA should be vacated because of the district court's lack of jurisdiction.*

2. If the government decides to seek review of the D.C. Circuit's decision, and if the Court is inclined to grant review, it should at that time also grant review of the present petition, so that the jurisdictional and substantive issues raised by the DOE subpoena enforcement actions can be considered together.

The government has responded in two ways to petitioners' substantive challenge to the propriety of the subpoenas. First, it has recast the question presented by the petition and has attempted to create the impression that petitioners seek review of factual findings by the courts below. Second, it has misinterpreted the record in such a way as to read into the affidavits of DOE officials representations that those officials in fact appear to have

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* The petition for a writ of certiorari was filed before the D.C. Circuit's decision on rehearing. At that time, petitioners urged that, if the D.C. Circuit were to rule that the district court lacked jurisdiction, this Court should vacate the TECA decision and remand for reconsideration in light of the D.C. Circuit's ruling. That recommendation was not intended to suggest that the TECA itself should consider whether it agreed with the D.C. Circuit's jurisdictional ruling. Rather, the thought was that, in view of the D.C. Circuit's ruling, the TECA would conclude that there was no need to reach the question of the subpoenas' validity. On reflection, it is clear that the appropriate result can be achieved simply through vacating the TECA decision. No remand is necessary, and therefore petitioners have modified their requested disposition of the current petition.

assiduously avoided making, *i.e.*, that the DOE subpoenas did actually—as opposed to hypothetically—have a bona fide civil purpose. Neither strategem should be permitted to divert the Court's attention from the important legal question presented by the petition.

a. The district court and the TECA held that the DOE subpoenas should be enforced because "DOE had made no determination to refer the case [to the Department of Justice] for criminal investigation" (Pet. App. 2a; see also Pet. App. 17a). Petitioners maintain that, under the principles set forth in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), this fact alone is not sufficient to establish the lawfulness of the subpoenas, and that therefore the decision below is fundamentally flawed.

Petitioners believe that the DOE subpoenas are unlawful because they were issued solely for the purpose of advancing a criminal investigation. The TECA's conclusion that petitioners did not make an adequate showing of improper purpose was predicated on the court's erroneous belief that, in order to establish an improper purpose, petitioners were required to prove that DOE had decided to refer the case to the Department of Justice. To demonstrate that in the absence of this erroneous legal standard, they would have had a substantial likelihood of success (or, at least, obtaining discovery), petitioners summarized the reasons for their belief regarding the subpoenas' purpose (Pet. 3-5, 7-9, 13-15). Contrary to the government's intimation (Br. in Opp. 5), petitioners' challenge the legal standard applied below, not any factual findings. Indeed, as far as we can determine, neither the district court nor the TECA made any such findings, apart from their conclusions regarding referral to the Department of Justice; the courts simply announced their legal judgments.

b. Even more egregious than the government's unilateral reformation of the question presented by petitioners are the government's inflated claims for the

affidavits of DOE officials submitted in support of the challenged subpoenas. The simple fact is that the affidavits do not say what the government seems to think they say.

The government relies (Br. in Opp. 8) on two affidavits, one by Jeffrey R. Whieldon, Deputy Solicitor of the Economic Regulatory Administration (ERA) in DOE (R-198 to R-201), and one by Jerome Wiener, Director of the ERA's Office of Special Investigations (R-202 to R-204). Neither affidavit contains a plain statement that the challenged subpoenas actually had a civil purpose.

Paragraph 6 of the Whieldon affidavit states that "[i]nformation obtained in the course of a special investigation may be used for many purposes" (R-198). It then lists eight possible purposes for which such information may be used (R-199). One of these purposes is "determining whether to refer the subject firm to the Department of Justice for criminal prosecution" (*ibid.*). Paragraph 15 of the Whieldon affidavit then says that, in issuing the subpoenas to petitioners, it was Mr. Whieldon's purpose "to utilize information gained therefrom in accordance with paragraph 6 above" (R-200). The affidavit does not say that DOE issued the subpoenas for all or even some of the civil purposes listed in Paragraph 6. It simply says that information obtained from the subpoenas would be used "in accordance with paragraph 6." This statement would be true even if, as petitioners contend, the information was to be used solely for "determining whether to refer the subject firm to the Department of Justice for criminal prosecution." Whieldon's affidavit is thus completely consistent with petitioners' belief that the DOE subpoenas were issued solely for a criminal purpose.

Paragraph 7 of Wiener's affidavit is identical to Paragraph 6 of Whieldon's. It too lists many purposes for which "[i]nformation obtained in the course of a special investigation may be used" (R-204), but it never once says that DOE intended to use any of the information sought in the disputed subpoenas for a civil purpose.

Ignoring the actual, carefully phrased language of the Whieldon and Wiener affidavits, the government finds in those affidavits representations that they simply do not contain. Notwithstanding this effort to buttress the record, the fact remains that no DOE official has ever represented to any court in any sworn statement that the subpoenas issued to petitioners did in fact have a legitimate civil purpose. Petitioners are convinced that that omission was not inadvertent, and that is why they have sought review of the legal standard applied by the courts below in reviewing the subpoenas' validity.

* * * *

For the foregoing reasons, and for the reasons stated in the petition for a writ of certiorari, the petition should be held pending the government's decision whether to seek review of the D.C. Circuit's ruling and, if a decision is made to seek review, pending the Court's disposition of the government's petition.

If further review of the D.C. Circuit's decision is not sought or is not granted, this petition should be granted and the TECA's judgment summarily vacated.

If further review of the D.C. Circuit's decision is sought and granted, this petition should be granted as well.

Respectfully submitted.

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